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No. 01-131

IN THE

Supreme Court of the United States

GARY E. GISBRECHT, BARBARA A. MILLER, NANCY SANDINE, AND DONALD L. ANDERSON,
PETITIONERS,

VS.

JO ANNE B. BARNHART,
COMMISSIONER OF SOCIAL SECURITY,
Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

AMICUS CURIAE BRIEF OF THE ASSOCIATION OF TRIAL LAWYERS OF AMERICA IN SUPPORT OF THE PETITIONER

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AMICUS CURIAE BRIEF OF THE ASSOCIATION OF TRIAL LAWYERS OF AMERICA IN SUPPORT OF THE PETITIONER

IDENTITY AND INTEREST OF *AMICUS CURIAE*

The Association of Trial Lawyers of America ("ATLA") respectfully submits this brief as amicus curiae in this case. Letters from Petitioner and Respondent granting consent to the filing of *amicus curiae* briefs have been filed with this Court.[1]

[1] Pursuant to Rule 37.6, Amicus discloses that no counsel for a party authored any part of this brief, nor did any person or entity other than Amicus Curiae, its members, or its counsel make

ATLA is a voluntary national bar association whose approximately 50,000 trial lawyer members primarily represent individual plaintiffs in civil actions, including actions seeking damages for wrongful death and personal injury, vindication of civil rights protected under federal and state statutes, and in other actions seeking legal redress.

ATLA's members are most commonly retained by their clients on a contingent fee basis. They know first-hand the role played by contingent fee agreements as a "key to the courthouse," affording access to justice for many Americans. They also know from experience that contingent fee financing provides a strong incentive for attorneys to accept meritorious cases and pursue them zealously and efficiently.

In view of this experience, ATLA is confident that this brief as *amicus curiae* will assist the Court in addressing the questions presented in this case.

SUMMARY OF THE ARGUMENT

1. When a claimant seeking social security benefits prevails in district court, 42 U.S.C. § 406(b) requires the court to determine "a reasonable fee" to be paid by the claimant to his or her attorney. Where the client has retained the attorney on a contingent fee basis, that fee should be regarded by the court as presumptively reasonable.

The lower court erred in ruling that the statute requires the district court to disregard the agreement and substitute its own calculation of a reasonable fee using the "lodestar" method. The text and legislative history of the statute indicate that Congress expected that claimants would continue to obtain

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a monetary contribution to the preparation or submission of this brief.

representation on a contingent fee basis and added protections for those claimants.

This Court's strong preference for use of the lodestar method under fee-shifting statutes should not extend to fees paid by clients to their own attorneys. The lodestar method provides a means of approximating the market value of legal services in circumstances where market forces cannot be relied upon to further the purposes of the statute. Where a market actually exists, there is no reason to substitute an approximation of a market price for the real thing.

2. Contingency fee agreements have long played an important role in the marketplace for legal services. Their use extends far beyond personal injury and tort law. Indeed, contingency fee financing has become the dominant means by which individuals and small businesses obtain legal representation involving monetary claims.

Contingency fee arrangements have become widely used because they serve important functions in the marketplace. They provide access to legal services to many individuals who could not otherwise pay for them. They assure that the economic interests of attorneys are aligned with those of their clients. They foster efficient use of resources by attorneys. And they are easily enforced without the need of secondary litigation.

3. By contrast, hourly billing, which was not widely used until the early 1960's, gives lawyers the incentive to maximize the time spent on legal matters, not the results. The emphasis on billable hours has led to scandalous defrauding of clients and an epidemic of padded billing.

The lodestar method places the perverse incentives inherent in hourly billing in the laps of the district courts. Judges have expressed dissatisfaction with the results of the lodestar method and the amount of judicial effort required to resolve fee petitions.

ARGUMENT

I. NEITHER THE TEXT OF 42 U.S.C. § 406(b) NOR THIS COURT'S ENDORSEMENT OF THE LODESTAR METHOD UNDER FEE-SHIFTING STATUTES SUPPORTS THE USE OF THE LODESTAR METHOD TO DETERMINE THE REASONABLENESS OF FEES PAID BY CLAIMANTS UNDER §406(b).

A. The Text and Legislative History Support the Courts' Treatment of Contingent Fee Agreements Between Claimant and Attorneys As Presumptively Reasonable.

In a departure from the prevailing American rule, certain federal statutes provide for a reasonable attorney's fee to be paid to the prevailing party in a civil action by the opposing party. To determine a reasonable fee under such fee-shifting statutes, this Court has stated that there is a "strong presumption" in favor of the "lodestar" formula -- a reasonable hourly rate multiplied by the number of hours reasonably expended. *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 478 U.S. 546, 565 (1986) (Clean Air Act, 42 U.S.C. §7604(d)). *See also Venegas v. Mitchell*, 495 U.S. 82, 87 (1990) (Civil Rights Attorney's Fees Awards Act, 42 U.S.C. § 1988), and *Blanchard v. Bergeron*, 489 U.S. 87, 94 (1989) (42 U.S.C. § 1988).

This case presents the question of whether that presumption that the lodestar method results in a reasonable fee is appropriate in cases where the court is called upon to determine a reasonable fee to be paid by the client to his or her own attorney. The court below disregarded the agreed-upon contingent fee arrangements between the clients and their attorneys. The court ruled that the district court properly made its own calculation of the fee to be paid to the attorney

by his client, using the lodestar method. *Gisbrecht v. Apfel*, 238 F.3d 1196, 1198 (2001).

In ATLA's view, the lodestar model is useful in those circumstances under fee-shifting statutes where market forces cannot be relied on to set a reasonable fee. In this case, such a private market was operating. The lower court erroneously substituted a proxy for the market value of the attorneys' services in place of the real thing.

The clients in these consolidated cases believed – correctly, as it turned out – that they were wrongfully denied Social Security disability benefits. They retained counsel to pursue their claims and agreed that, if successful, they would pay the attorneys a fee equal to 25% of the back benefits awarded. The court rejected the Petitioners' evidence that these agreements reflected the market rate for legal representation of social security claimants. 238 F.3d at 1198. Rather, the court held, to determine "a reasonable fee" under 42 U.S.C. § 406(b), "a district court must set a reasonable lodestar rate for counsel's services," which is "a reasonable *hourly* rate." Id. (emphasis by the court).

Congress enacted the Social Security Act in 1935 to provide a safety net to protect wage earners and their families from impoverishment due to old age, death, and disability. The Act also created the Social Security Administration to administer these programs. Congress made no provision at that time regarding the costs of legal representation of claimants disputing the Administrator's denial of benefits in district court. Typically, attorneys typically represent claimants on the basis of contingent fee agreements.

In 1965, Congress acted to address a specific problem relating to those agreements. The Senate Finance Committee explained:

> It has come to the attention of the committee that attorneys have upon occasion charged what appear to be inordinately large fees for representing claimants in

> Federal district court actions arising under the social security program. Usually, these large fees result from a contingent-fee arrangement under which the attorney is entitled to a percentage (frequently one-third to one-half) of the accrued benefits. Since litigation necessarily involves a considerable lapse of time, in many cases large amounts of accrued benefits, and consequently large legal fees, are payable if the claimant wins the case.

S. Rep. No. 404, 89th Cong., 1st Sess., Pt. 1 at 122, reprinted in 1965 U.S. Code Cong. & Admin. News 305, 2062 (1965).

The lawmakers' response was not to prohibit contingent fees. Instead, Congress added § 406(b) to Title II of the Act to protect claimants against abuses. That section provides:

> Whenever a court renders a judgment favorable to a claimant under this subchapter who was represented before the court by an attorney, the court may determine and allow as part of its judgment a reasonable fee for such representation, not in excess of 25 percent of the total of the past-due benefits to which the claimant is entitled by reason of such judgment, and the Commissioner of Social Security may . . . certify the amount of such fee for payment to such attorney out of, and not in addition to, the amount of such past-due benefits.

42 U.S.C. § 406(b).

The statutory text is framed in terms of contingent fees, making the attorney's fee conditional on a judgment favorable to the claimant and imposing a ceiling on the percentage of past-due benefits that the attorney may charge. Congress clearly expected that claimants would continue to obtain the services of attorneys on a contingent fee basis. By requiring federal courts to determine that such fees are reasonable, Congress simply adopted the familiar approach universally employed by state courts. State courts have long

exercised their authority to invalidate contingent fee agreements which were obtained improperly or which result in an excessive fee. *See* 1 Stuart M. Speiser, Attorneys' Fees 2.9 & 2.10 (1973).

Nothing suggests that Congress intended courts to determine "a reasonable fee" based on the number of hours devoted by the attorney to the case. The lodestar method itself was not devised until the Third Circuit's decision in *Lindy Bros. Builders v. American Radiator & Standard Sanitation Corp.*, 540 F.2d 102, 117 (3d Cir. 1976). Indeed, billing clients by the hour was still a very new innovation in 1965, used by only a few large law firms engaged in corporate work. *See* Part III, below. It is quite unlikely that Congress would have intended, without any comment, such a drastic departure from prevailing practice based on this novel method of charging clients.

The Courts of Appeals of the Second, Sixth and Seventh Circuits have concluded that the statute permits courts to treat a contingent fee agreement between a claimant and counsel as presumptively reasonable. *Wells v. Sullivan*, 907 F.2d 367, 371 (2d Cir. 1990); *Rodriquez v. Bowen*, 865 F.2d 739, 746 (6th Cir. 1989); *McGuire v. Sullivan*, 873 F.2d 974, 981 (7th Cir. 1989). Those courts take the amount of the fee due under the contract as a starting point. *See Wells*, 907 F.2d at 371 ("the best indicator of the 'reasonableness' of a contingency fee in a social security case is the contingency percentage actually negotiated between the attorney and client"); *Rodriquez*, 865 F.2d at 746 (stating that the agreement between the client and attorney "should be given the weight ordinarily accorded a rebuttable presumption.").

Under this approach, the courts are not bound to accept the agreed upon fee as reasonable per se. The courts review the circumstances surrounding the contingency agreement carefully to determine whether there are any factors which would render the agreement unreasonable. *Rodriguez* at 746; *Wells*, 907 F.2d at 372; *McGuire*, 873 F.2d

at 980-81. The court will reduce a fee that is the product of the attorney's own misconduct or incompetence, such as where the attorney's improper conduct has resulted in undue delay. In addition, reduction is appropriate where counsel would otherwise receive a "windfall" because the benefit award turns out to be unusually large or the amount of work required turns out to be minimal. *Rodriquez*, 865 F.2d at 746-47.

ATLA submits that this approach is most consistent with the language and intent of 42 U.S.C. § 406(b). It gives effect to contracts for legal services shaped by market forces, while affording clients the same degree of protection they have traditionally enjoyed under state law against abusive or excessive contingent fees.

B. This Court's Endorsement of the Lodestar Method in Fee Shifting Cases Does Not Support the Use of the Lodestar Method in Place of Contingent Fee Agreement.

The Ninth Circuit, in its short opinion in this case and in its earlier decisions specifically rejected this approach. 238 F.3d at 1198 n.2. In those prior decisions, the court relied heavily on this Court's approval of the lodestar method in *Hensley v. Eckerhart,* 461 U.S. 424 (1983). *See Allen v. Shalala,* 48 F.3d 456, 458-59 (9th Cir. 1995). Other courts of appeals have reached similar conclusions, also in reliance on this Court's endorsement of the lodestar model. *See Craig v. Secretary, Dep't of Health & Human Services.,* 864 F.2d 324, 327 (4th Cir. 1989); *Brown v. Sullivan,* 917 F.2d 189, 192 (5th Cir. 1990); and *Cotter v. Bowen,* 879 F.2d 359, 363 (8th Cir. 1989).

This reliance, ATLA submits, is misplaced.

In *Hensley*, this Court addressed the problem of evaluating fee petitions under the Civil Rights Attorney's

Fees Awards Act, 42 U.S.C. § 1988. In such cases, "[t]he most useful starting point for determining the amount of a reasonable fee is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate." 461 U.S. at 433. Indeed, this Court has stated that there is a "strong presumption that the lodestar figure--the product of reasonable hours times a reasonable rate--represents a 'reasonable fee' is wholly consistent with the rationale behind the usual fee-shifting statute." *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air,* 478 U.S. 546, 565 (1986). See also *City of Burlington v. Dague,* 505 U.S. 557, 563 (1992) ("The 'lodestar' figure has, as its name suggests, become the guiding light of our fee-shifting jurisprudence. We have established a 'strong presumption' that the lodestar represents the 'reasonable' fee.")

However, this Court has made it clear that its use of the lodestar method in fee-shifting cases is necessary because the usual market forces that determine the value of legal services cannot be relied upon. As Justice O'Connor noted, "The private market commonly compensates for contingency through arrangements in which the attorney receives a percentage of the damages awarded to the plaintiff. In most fee-shifting cases, however, the private market model of contingency compensation will provide very little guidance." *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 483 U.S. 711, 731 (1987) (O'Connor, J., concurring). See also *Coup v. Heckler*, 834 F.2d 313, 324 (3d Cir. 1987) (because the fees sought under § 406 are paid by the client, rather than by the defendant, "the concerns which motivated the plurality in *Delaware Valley* are not implicated at all.").

This is true for several reasons. Most importantly, when federal statute shifts the fee obligation from the client to the opposing party, the customer is not bargaining with his or her own money and lacks the incentive to keep costs reasonable. In the absence of market forces, the district court must provide those curbs.

In addition, "[u]nlike most private tort litigants, a civil rights plaintiff seeks to vindicate important civil and constitutional rights that cannot be valued solely in monetary terms." *Riverside v. Rivera,* 477 U.S. 561, 574 (1986). As Justice Scalia observed in *City of Burlington v. Dague*, 505 U.S. 557, 564 (1992), "for a very large proportion of contingency-fee cases--those seeking not monetary damages but injunctive or other equitable relief--there is no 'market treatment.' Such cases scarcely exist, except to the extent Congress has created an artificial 'market' for them by fee shifting." Nevertheless, Congress intended "to encourage successful civil rights litigation, not to create a special incentive to prove damages and shortchange efforts to seek effective injunctive or declaratory relief." *Blanchard v. Bergeron*, 489 U.S. 87 (1989). The lodestar method serves this special purpose.

Finally, as Congress has also recognized, particularly in civil rights cases, the benefits obtained by counsel are not limited to the particular litigant but extend to society at-large. *Blanchard v. Bergeron,* 489 U.S. 87, 96 (1989). For this reason, courts may under a fee-shifting statute approve a fee that the market place would reject. *See, e.g., Copeland v. Marshall*, 641 F.2d 880 (D.C. Cir. 1980) (approving $160,000 fee for attorney services in a gender discrimination suit resulting in an award of $33,000 in damages and injunctive relief).

In sum, this Court has endorsed the use of the lodestar method as a proxy for market forces in those situations where no real market exists which serves the statutory purpose. As other circuits have recognized, this does not preclude the use of a contingent fee agreement as presumptively reasonable in social security benefits cases, where a private market for legal services actually exists. *Rodriquez v. Bowen*, 865 F.2d 739, 745-46 (6th Cir. 1989) (en banc); *Wells v. Bowen*, 855 F.2d 37, 44-46 (2d Cir. 1988); *Coup v. Heckler*, 834 F.2d 313, 324 (3d Cir. 1987)

II. A CONTINGENCY FEE AGREEMENT REFLECTS THE MARKET VALUE OF LEGAL SERVICES AND IS PRESUMPTIVELY REASONABLE

A. Contingency Fee Agreements Play an Important Role in the Market for Legal Services.

ATLA has long championed the use of contingency fee arrangements to purchase legal services. However, ATLA also recognizes that such agreements have been highly controversial and that this controversy may affect the decision whether such agreements should serve as the starting point for determining "a reasonable fee" under 42 U.S.C. §406. It is worthwhile, therefore, to examine the role contingency fees play in the marketplace for legal services in America.

At other times and in other places, lawyers (ostensibly) did not charge for their services. An English barrister, William Forsythe, wrote in 1849:

> From the very earliest times, and in every country where advocacy has been known, it has been the custom to look upon the exertions of the advocate as given gratuitously, and the reward which the client bestows as purely honorary, in discharge not of legal obligation, but a mere debt of gratitude.

Quoted in Furlonger, Time for Business-Lawyers to Stop Billing Time?, Beyond the Billable Hour: An Anthology of Alternative Billing Methods 93 (R. Reed ed. 1989).

At one time, the Roman Republic banned legal fees; the honor of being a successful advocate was deemed its own reward. However, as Roman law developed in complexity, lawyers were able to obtain a customary gratuity, unenforceable against the client. There was a time when English barristers would meet their clients at the pillars in St. Paul's and around Doctors' Commons where the client

customarily placed an honorarium in a purse that hung at the back of the advocate's gown as the barrister looked away. Elizabeth A. Kovachevich and Geri L. Waksler, *The Legal Profession: Edging Closer To Death With Each Passing Hour*, 20 Stetson L. Rev. 419, 420 (1991).

The American civil justice system recognizes that access to justice depends upon the broad availability of legal representation. The compensation of attorneys is part of the price of liberty under the rule of law. Generally, the clients of attorneys pay that price. The American rule is that, unless a statute provides otherwise, parties in civil litigation are responsible for their own legal costs. *Alyeska Pipeline Services. Co. v. Wilderness Soc'y*, 421 U.S. 240, 247-50 (1975). The result is a marketplace in which clients as customers purchase legal services. This Court has consistently encouraged the free operation of that marketplace. *See Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975)(striking down minimum fee schedules); *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977) (attorney advertising); *Peel v. Attorney Registration and Disciplinary Comm.*, 496 U.S. 91 (1990) (attorney commercial speech regarding specialization).

For most of our history, Americans have purchased the services of attorneys in one of two ways. An attorney and client might agree upon a fixed fee for a specified service. Such arrangements remain in common use for relatively simple and predictable legal services, such as preparing a will or handling a real estate settlement.

From very early in our country's history, Americans seeking monetary damages have also retained lawyers on a contingency basis, agreeing to pay the attorney only if the claim is successful in an amount measured by a percentage of the recovery. Pennsylvania's Justice Brackenridge observed in 1814 the practice of attorneys "taking what are called contingent fees." Despite some prohibitions against this

practice, "at an early period, it was tolerated, and has become common." H.H. Brackenridge, in LAW MISCELLANIES xx (Stanley Katz et al. eds., 1972) (1814). As early as 1786, a Massachusetts pamphleteer railed against this "pernicious practice," by which people "give one quarter part of their property to secure the remainder, when they appeal to the laws of their country." Honestus [pseud. of Benjamin Austin], *Observations on the Pernicious Practice of the Law* (Boston, 1819), reprinted in 13 Am. J. Legal Hist. 241, 256 (1969).

Despite that, contingency fee arrangements became increasingly popular with clients in early America. They included merchants and creditors, the heirs of millionaires and Revolutionary War veterans, American diplomats and Indian tribes. Their lawyers included such accomplished litigators as Henry Clay and Daniel Webster. Contingency fee contracts also provided representation to settlers and claimants with conflicting land grants and titles in newly-settled states. *See* Peter Karsten, *Enabling The Poor To Have Their Day In Court: The Sanctioning Of Contingency Fee Contracts*, A History To 1940, 47 DePaul Law Review 231, 237-38 (1998) (citing cases).

Following the Civil War, Americans retained counsel on a contingency fee basis to represent them in a wide variety of legal disputes, including minority stockholder suits against corporations, depositor suits against banks, creditors and merchants pressing claims against railroads, other companies or the government. Even government entities suing other government entities over tax revenues retained contingent fee lawyers. Those lawyers included some of the most respected members of the bar. Karsten, *supra* at 248. "Moreover, when challenged in court, virtually all of these contracts were indeed deemed to be valid and binding." *Id.* at 249.

This Court added its approval, even for claims against the federal government. *Ball v. Halsell*, 161 U.S. 72 (1896), involved a statute allowing the Court of Claims to adjudicate

claims arising out of Indian depredations. Congress permitted a contingent fee of up to 20% to be paid out of the sum collected. The Court stated:

> By several decisions of this court,--indeed, beginning at December term, 1853,--contracts for contingent fees, by which attorneys, employed to prosecute claims against the United States, were to be allowed a proportion of the amount recovered in case of success, and nothing in case of failure, were held to be lawful and valid.

Id. at 80. In *Stanton v. Embrey*, 93 U.S. 548 (1876), the Court upheld claims for attorney fees for prosecuting claims against the U.S. following the Civil War. The Court noted that attorneys "usually charged contingent fees of from twenty to twenty-five per cent, which the plaintiff's witnesses regarded as a reasonable charge." The Court rejected the argument that such fees are improper, stating it was "beyond legitimate controversy" that such contracts are to be enforced "if they are free from any taint of fraud, misrepresentation, or unfairness." *Id.* at 556-57.

Contingent fees are perhaps most closely identified with personal injury lawsuits. As tort law developed to deal with the carnage of negligently inflicted injuries and deaths that accompanied the Industrial Revolution, the contingent fee offered workers and their families their only means of obtaining compensation.

As Pennsylvania Justice Michael A. Musmanno famously declared:

> If it were not for contingent fees, indigent victims of tortious accidents would be subject to the unbridled, self-willed partisanship of their tortfeasors. The person who has, without fault on his part, been injured and who, because of his injury, is unable to work, and has a large family to support, and has no money to engage a lawyer, would be at the mercy of the person who disabled him because, being in a superior economic position, the injuring person could force on his victim, desperately in need of money to keep the candle of life burning in himself and his dependent ones, a wholly unconscionable meager sum in settlement or even refuse to pay him anything at all. Any society, and especially a democratic one, worthy of respect in the spectrum of civilization, should never tolerate such a victimization of the weak by the mighty.

Richette v. Solomon, 187 A.2d 910, 919 (Pa. 1963).

Today, contingent fee financing is not only the near-universal choice of plaintiffs in personal injury and other tort actions, but is commonly used "in collection suits, shareholder derivative suits, antitrust suits for damages, tax cases, will contests, and condemnation proceedings," Richard M. Birnholz , *The Validity and Propriety of Contingent Fee Controls,* 38 UCLA Law Review 949, 952-53 (1990), in contract cases, *see* Herbert M. Kritzer, *The Wages Of Risk: The Returns of Contingency Fee Legal Practice*, 47 DePaul L. Rev. 267, 267 n.1 (1998) ("Civil Litigation Research Project data showed that 62% of individual plaintiffs in contract cases had paid their lawyers on a contingency basis."), and in tax cases and patent litigation. ABA Formal Op. 94-389 (December 5, 1994).

In short, the contingent fee is "the dominant system in the United States by which legal services are financed by those seeking to assert a claim." F. MacKinnon, CONTINGENT FEES FOR LEGAL SERVICES 4 (1964). See also Herbert M. Kritzer, THE JUSTICE BROKER: LAWYERS AND ORDINARY LITIGATION 58-59 (1990). It makes little sense to demand that the reasonableness of fees paid by individuals pursuing damage claims be measured against the yardstick of the "prevailing" hourly rate for similar services. The contingent fee *is* the prevailing rate for such services in the marketplace.

Corporate clients are also demanding – and receiving – contracts for legal work that incorporate aspects of contingency agreements. *See* ABA Formal Op. 94-389, *supra*, noting the trend toward making attorney compensation

in mergers and acquisitions, public stock offerings, and loan transactions contingent in whole or in part on the successful completion of the transaction. Much of this trend is driven by intense dissatisfaction with hourly billing. *See* Cobb, *Competitive Pricing Along The Value Curve; or The Folly of Hourly Rate Pricing*, 14 Legal Econ. Sept. 1988, at 28 (discussing "value added billing" as a replacement for hourly billing); Hertzberg & Stewart, "Contingency Legal Fee for Merger Breaks Ground, Stirs Controversy," Wall St. J., Oct. 24, 1986, at 31, col. 4 (discussing contingent fees in corporate mergers and acquisitions); Reed, *Value Billing: An Update from the ELP Section's Task Force*, 14 Legal Econ. Sept. 1988, at 20.

Even defendants are making increasing use of "reverse contingent fees," in which defendants hire lawyers who will be compensated by an agreed upon percentage of the amount the client saves. *See* ABA Formal Op. 94-389, *supra*.

The reason contingent fee arrangements have become so widely used in such a broad array of circumstances is that they serve important market functions that promote the availability of legal services at reasonable prices.

B. Contingent Fee Arrangements Serve Important Market Functions.

1. Increasing Access to the Marketplace.

The contingent fee provides legal representation for many people who could not otherwise afford to secure their rights. *See* Philip H. Corboy, *Contingency Fees: The Individual's Key to the Courthouse Door*, 2 Litigation 27 (Summer 1976). Even the harshest critics of contingent fees agree that they are essential to providing access to justice:

> Contingency fees are vital to the vindication of important legal rights in that they enable accident

> victims and other injured persons to have access to both counsel and the courts which would not be otherwise feasible. Under the contingency fee system, clients who cannot afford the risk of liability for attorney's fees if they fail to recover damages can proceed fully with their cases; their attorneys can be paid only from money that the clients actually recover.

Lester Brickman, *ABA Regulation of Contingency Fees: Money Talks, Ethics Walks*, Fordham L. Rev. 247, 270 (1996).

This key to the courthouse is not limited to the indigent. The cost of competent representation for even moderately complicated claims can be well out of reach for middle class families. Even the well-off, who might be able to afford to pay tens of thousands of dollars to pursue a substantial claim are likely to forego their rights in the face of a significant probability that their investment may be lost. The contingent fee lawyer essentially assumes the risk of loss.[2]

2. Aligning of the Interests of Attorney and Client

The contingent fee arrangement assures that the lawyer's economic interest coincides with the client's. If the lawyer gets paid only when the client prevails, he or she has a powerful incentive to evaluate the case honestly at the outset and devote the effort required to win. As Judge Easterbrook explains:

> The contingent fee uses private incentives rather than careful monitoring to align the interests of lawyer and client. The lawyer gains only to the extent his client gains. This interest-alignment device is not perfect. . . .

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[2] It is not accurate to state that those clients who win subsidize the losers – any more than a company whose stock rises is subsidizing those companies in an investor's portfolio whose shares lose value. The attorney who takes a contingent fee case assumes the risk of loss for that case. If it were the attorney's only case, he or she would charge the same prevailing contingency rate.

> But [an] imperfect alignment of interests is better than a conflict of interests, which hourly fees may create.

Kirchoff v. Flynn:786 F.2d 320, 325 (7th Cir. 1986). *See also* Charles Silver, *Due Process And The Lodestar Method: You Can't Get There From Here*, 74 Tulane L. Rev. 1809 (2000) (citing authorities that show a "broad consensus that percentage-based formulas harmonize the interests of agents and principals better than time-based formulas like the lodestar approach.").

3. Promoting Efficient Use of Resources

It is in the contingent fee attorney's interest to obtain the maximum result for the client while making the most efficient use of resources. Attorneys have strong incentives to avoid duplication and reinventing the wheel by sharing information and resources. Marc Galanter, *Anyone Can Fall Down a Manhole: The Contingency Fee and Its Discontents*, 47 DePaul L. Rev. 457, 472 (1998).

ATLA was founded to promote such efforts by the plaintiff's bar and continues to do so through its education programs, publications and document exchange service. In addition, ATLA has encouraged the activities of litigation groups, which enable attorneys with similar cases to share the expense of discovery and pretrial proceedings. *See* Paul D. Rheingold, *The Development of Litigation Groups*, 6 Am. J. Trial Advocacy 1 (1982).

4. Simplifying Enforcement

The contingent fee arrangement is relatively transparent and simple to administer. The amount of the fee may be unknown when the agreement is signed, but after the counsel and client prevail, the determination is a simple matter of arithmetic. Most clients are ill equipped to oversee

their lawyers to determine whether the number of depositions is excessive or whether a 50-page motion is overkill. Nor does the attorney relish the prospect, after prevailing on the merits, of undertaking a secondary litigation to establish the amount of the fee. Nor, it may be ventured, do judges view such fee litigation as a worthwhile use of their time.

C. The Contingent Fee Does Not Promote Wasteful Litigation or "Windfall" Fees for Attorneys.

Contingency fees have also been sharply criticized. It should be noted, however, that much of the criticism comes from those who are less interested in protecting the clients than in placing obstacles in their way to their day in court. *See* Barry J. Nace, *The "Legal Scholars" Speak on Contingency Fees*, Trial, Apr. 1994, at 7. The most frequently heard complaints are that they encourage plaintiffs to file frivolous lawsuits and allow attorneys to reap very large fees based on very little work. ATLA submits that both objections are factually incorrect.

1. Contingent fees do not encourage frivolous litigation.

The contingent fee provides access to justice for many individuals and businesses who could not otherwise seek legal redress. There is simply no evidence, however, that contingent fee encourages groundless claims. Indeed, the attorney's financial incentive presses in the opposite direction, in favor of selecting meritorious cases. As a study prepared by the Rand Corporation observed,

> The common allegation that the contingent fee induces attorneys to bring claims with little legal merit has no basis in logic. The fact that the fee depends on winning provides an incentive to screen out cases with little legal merit -- an incentive that is lacking with an hourly fee.

Patricia Munch Danzon, Rand Corporation, Institute for Civil Justice, "Contingent Fees for Personal Injury Litigation," Summary at viii (R-2458-HCA, June 1980).

An earlier study conducted by the federal government similarly concluded that "The contingent fee arrangement does not encourage lawyers to accept nonmeritorious cases with a low probability of winning just because the possible recovery is large." Stephen D. Dietz, C. Bruce Baird, and Lawrence Berul, "The Medical Malpractice Legal System," Report of the Secretary's Commission on Medical Malpractice, U.S. Department of Health, Education and Welfare 87, 154 (January 16, 1973).

2. Contingent Fees Do Not Result in "Windfall" Attorney Fees.

The second major objection to contingent fee agreements is that in some circumstances they result in a large fee for very little work by the attorney. Critics point to specific instances, generally involving early settlements of claims that had very little risk of nonrecovery, where the attorney was able to obtain compensation for the client by filling out some routine paperwork. *See e.g.,* Lester Brickman, *Contingent Fees Without Contingencies: Hamlet Without the Prince of Denmark*? 37 UCLA L. Rev. 29, 79-84 (1989).

ATLA submits that such windfalls are not as common as critics suggest. Empirical studies over the years have consistently found that, overall, contingency fee attorneys do not earn substantially more per hour than their counterparts who bill on an hourly basis. *See* Herbert M. Kritzer, *The Wages of Risk: The Returns of Contingency Fee Legal Practice*, 47 DePaul L. Rev. 267, 304 (1998) (data indicates that "returns from contingency fee practice are at best 'somewhat' better than what lawyers earn from hourly fee

practices."); Patricia Munch Danzon, Rand Corporation, supra at viii ("What little empirical evidence is available confirms that, averaging over cases won and lost, the effective hourly earnings of attorneys paid on a contingent basis are similar to the hourly earning of defense attorneys paid by the hour.").

For those abuses that do occur, the authority of courts to alter or set aside a contingent fee contract is "well established." *Schlesinger v. Teitelbaum,* 475 F.2d 137, 141 (3d Cir.), *cert. denied,* 414 U.S. 1111 (1973). Nor have courts been reluctant to use that authority. *See, e.g., In re Gerard*, 548 N.E.2d 1051 (Ill. 1989) (contingency fee agreement struck down where the case merely required the completion of forms to secure client funds not at a risk of loss and where no litigation was required); Brickman, *supra* at 79-84 (citing cases); Neil Galatz and Stacie Hane, *The Ethics Of Contingency Fee Agreements*, 5 Nevada Lawyer 22 (1997); *See generally*, Robert L. Rossi, ATTORNEY'S FEES § 2.8 - 2.10 (2d ed. 1995).

Even where the contingent fee agreement was appropriate when signed, "changes in circumstances occurring after negotiation of the fee agreement may lead a reviewing court to decide, ex post facto, that payment of the fee is unreasonable." ABA Formal Op. 94-389 (December 5, 1994). *See, e.g., Mckenzie Construction Inc. v. Maynard,* 758 F.2d 97 (3d Cir. 1985).

Similar examples are likely to be rare in Social Security benefit litigation before the district courts. However, those courts of appeals that favor using the agreed-upon contingent fee as the starting point in determining a reasonable fee under 42 U.S.C. § 406 make clear that the district judge is to review the award for possible abuses. *Rodriguez* at 746; *Wells*, 907 F.2d at 372; *McGuire*, 873 F.2d at 980-81.

III. THE LODESTAR METHOD OFFERS LITTLE MARKET ASSURANCE AGAINST UNREASONABLE FEES.

A. Hourly-Rate Billing Is Based on an Inherent and Perverse Incentive to Maximize Hours Rather Than Results.

The lodestar method is simply a special application of hourly-rate billing. The notion of charging the client based on the hours spent by the attorney is relatively new, coming into its own in the early 1960's. Its adoption has been traced to the confluence of several factors. These include the increasing complexity of litigation and discovery and the decline in lawyers' incomes during the 1950's. See George B. Shepherd and Morgan Cloud, *Time And Money: Discovery Leads To Hourly Billing*, 1999 U. Ill. L. Rev. 91, 92-93, along with the dramatic growth in the size of major law firms and the advent of computerized time management. Carl T. Bogus, *The Death Of An Honorable Profession*, 71 Ind. L.J. 911, 923-24 (1996).

Billing by the hour was promoted by experts in law office management entirely as a means of increasing large law firm revenue, specifically by leveraging the work of the growing cadre of associates. Eugene C. Gerhart, *The Art of Billing Clients*, 1 Law Off. Econ. & Mgmt. 29, 30 (1960). There may be nothing wrong with that. However, it was never designed to result in a more reasonable fee to the client. "[I]ndeed, an incentive emerged to be inefficient and run up billable hours." Bogus, *supra*, at 924.

Predictably, this built-in incentive resulted in a dramatic increase in the number of hours billed, especially by associates. Some boasted as many as 3000 hours a year. *Id.* Some clients rebelled. For example, Zoe Baird, general counsel for Aetna Life & Casualty company, told the 1992 annual meeting of the American Bar Association:

> There is no credible economic theory underlying the hourly billing method, and for that reason, we no longer accept it as the sole, or even predominant, method of pricing legal services. In fact, hourly billing pushes economic incentives in the wrong direction -- weakening rather that strengthening the bonds between performance and pay. . . . Productivity is better measured by results."

Sherry Matteucci, "What the Heck Is 'Value Billing' Anyway?" Montana Lawyer, November 1992, at 2. *See generally* William G. Ross, THE HONEST HOUR 1-8 (1996) (listing the voluminous literature condemning hourly billing).

Worse yet, this perverse incentive to bill more hours tempts many to inflate their time. William H. Rehnquist, *The Legal Profession Today*, 62 Ind. L.J. 151, 153 (1987).

In the 1980's the profession was rocked by the number of leading lawyers at prestigious firms who were indicted or disciplined for defrauding clients. Those clients were presented with legal bills that contained hundreds of thousands of dollars in padded billing, double billing, and outright fictitious billing. See Lisa G. Lerman, *Blue-Chip Bilking: Regulation Of Billing And Expense Fraud By Lawyers*, 12 Geo. J. of Legal Ethics 205 (1999).

The problem is not limited to a few unethical attorneys. In a confidential survey, two-thirds of questioned practitioners said they knew of specific instances of padding. William G. Ross, *The Ethics of Hourly Billing by Attorneys*, 44 Rutgers L. Rev. 1, 93 (1991). Professor Bogus laments that "a significant segment of the bar routinely and patently pads bills and defrauds clients." It is a "silent epidemic." Bogus, *supra* at 914 & 922.

B. The Lodestar Method Incorporates the Perverse Incentives of Hourly Billing.

The lodestar method simply takes the perverse incentives of the hourly rate system and dumps them in the

laps of the district courts. A Task Force Report to the Third Circuit stated:

> [The lodestar approach] encourages lawyers to expend excessive hours, and, in the case of attorneys presenting fee petitions, engage in duplicative and unjustified work, inflate their "normal" billing rate, and include fictitious hours or hours already billed on other matters, perhaps in the hope of offsetting any hours the court may disallow.

Court Awarded Attorney Fees: Report of the Third Circuit Task Force, 108 F.R.D. 237, 247-48 (1985).

The Federal Courts Study Committee followed with its finding that the lodestar method "may unduly burden judges and give lawyers incentives to run up hours unnecessarily, ... lead[ing] to overcompensation or later litigation over fee padding. REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 104 (Apr. 2, 1990)

One scholar asserts that these views reflect a "widespread belief" among judges and commentators. Charles Silver, *Unloading The Lodestar: Toward A New Fee Award Procedure*, 70 Tex. L. Rev. 865, 868 (1992) (citing supporting authorities).

ATLA submits that where the parties are necessarily seeking money damages in the form of social security benefits and there exists a market to supply representation on a contingent fee basis, there is good reason to view the agreed-upon contingent fee as presumptively reasonable and no basis for presuming the reasonability of a lodestar fee.

CONCLUSION

For the above reasons, Amicus urges this Court to reverse the decision of the court of appeals.

Respectfully submitted,

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